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JURISDICTION OVER NONRESIDENTS DOING BUSINESS WITHIN A STATE

A PERSONAL judgment against a defendant over whom the court rendering it has no jurisdiction is invalid. It is not merely reversible on writ of error or appeal, but is wholly void for all purposes.[1] An attempt to execute it is without justification; a sheriff levying upon property of the defendant is liable for conversion,[2] and a purchaser of the property on execution sale gets no title to it.[3] A court of equity may, where the remedy at law is inadequate, enjoin the execution of the judgment.[4] No action lies upon it either in the state wherein it is rendered [5] or in any other state.[6] It cannot be set up as a bar in a suit upon the original cause of action.[7]

If these fundamental principles of the conflict of laws are disregarded by a state court, they may be vindicated in the federal courts, for they are protected by two provisions of the federal Constitution. If a judgment is rendered in one state and an action is brought thereon in another state, a federal question is involved

[1] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Needham *v.* Thayer, 147 Mass. 536 (1888).

[2] See Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 340 (1828).

[3] McKinney *v.* Collins, 88 N. Y. 218 (1882).

[4] Riverside, etc. Mills *v.* Menefee, 237 U. S. 189 (1915).

[5] Needham *v.* Thayer, 147 Mass. 536, 18 N. E. 429 (1888).

[6] Buchanan *v.* Rucker, 9 East, 191 (1808); Schibsby *v.* Westenholz, L. R. 6 Q. B. 155 (1870); Pennoyer *v.* Neff, 95 U. S. 714 (1877); Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6 (1891); McEwan *v.* Zimmer, 38 Mich. 765 (1878); Whittier *v.* Wendell, 7 N. H. 257 (1834); Price *v.* Schaeffer, 161 Pa. 530, 29 Atl. 279 (1894).

[7] McDonald *v.* Mabee, 243 U. S. 90 (1917).

under the provision of Article IV, section 1, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." [8] The enforcement of a judgment against a defendant over whom the court has no jurisdiction involves a violation of the provision of the Fourteenth Amendment that no state shall "deprive any person of life, liberty or property without due process of law." [9] The decisions of the Supreme Court of the United States upon the question of jurisdiction over the defendant are, therefore, under these two provisions, binding upon the states.

"The foundation of jurisdiction is physical power." [10] A state cannot authorize its courts to reach out and impose liabilities upon persons over whom the state has no control. In other jurisdictions such an attempt would be regarded as an impertinence, an unauthorized assumption of power. "Can the island of Tobago pass a law to bind the rights of the whole world?" asked Lord Ellenborough. "Would the world submit to such an assumed jurisdiction?" [11] In the leading case of *Pennoyer* v. *Neff*,[12] Mr. Justice Field said:

"The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

A state cannot compel parties domiciled in another state to leave it and respond to proceedings brought against them, or impose liabilities upon them on their failure to appear. It is immaterial

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[8] Dull *v.* Blackman, 169 U. S. 243 (1898); Old Wayne Life Ass'n *v.* McDonough, 204 U. S. 8 (1907).

[9] Dewey *v.* Des Moines, 173 U. S. 193 (1899); Simon *v.* Southern Ry. Co., 236 U. S. 115 (1915); Riverside, etc. Mills *v.* Menefee, 237 U. S. 189 (1915). See Pennoyer *v.* Neff, 95 U. S. 714, 732, 733 (1877).

[10] McDonald *v.* Mabee, 243 U. S. 90 (1917), per Holmes, J.

[11] Buchanan *v.* Rucker, 9 East, 191 (1808).

[12] 95 U. S. 714, 720 (1877). See also Baker *v.* Baker, Eccles & Co., 242 U. S. 394 (1917), per Pitney, J.: "To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory."

whether or not the claim upon which the judgment is rendered arose within the state wherein the judgment is rendered.[13] It is immaterial whether or not the defendant has property in the state,[14] although in a proceeding *in rem* or *quasi in rem*, judgment may be given against the property.[15] It is immaterial whether or not the defendant had notice of the action and an opportunity to be heard.[16] It is indeed necessary to due process that steps should be taken calculated to give the defendant notice and an opportunity to be heard; but something more than notice and an opportunity to be heard is necessary. The judgment is valid only when the state has some power, some control over the defendant.

The state has such control as to justify it in giving judgment in at least three cases: first, when the defendant is present within the state; second, when he has consented to the jurisdiction of the state; and third, when he is a citizen or resident of the state. If the state has control of the defendant at the time when action is

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[13] Sirdar Gurdyal Singh *v.* Rajah of Faridkote, [1894] A. C. 670; Emanuel *v.* Symon, [1908] 1 K. B. 302 (C. A.). See Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 283, 296.

[14] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Dewey *v.* Des Moines, 173 U. S. 193 (1899); De Arman *v.* Massey, 151 Ala. 639, 44 So. 688 (1907); Easterly *v.* Goodwin, 35 Conn. 273 (1868); Eastman *v.* Dearborn, 63 N. H. 364 (1877).

A few early cases holding that jurisdiction over the defendant's property gives jurisdiction to pronounce a personal judgment against him, have, since the decision in Pennoyer *v.* Neff, been discredited. De Arman *v.* Massey, *supra;* Laughlin *v.* Louisiana, etc. Co., 35 La. Ann. 1184 (1883); Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. 967 (1891).

[15] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Arndt *v.* Griggs, 134 U. S. 316 (1890); Dewey *v.* Des Moines, 173 U. S. 193 (1899); Clark *v.* Wells, 203 U. S. 164 (1906); De Arman *v.* Massey, 151 Ala. 639, 44 So. 688 (1907); Cloyd *v.* Trotter, 118 Ill. 391, 9 N. E. 507 (1886); Beard *v.* Beard, 21 Ind. 321 (1863); Elmendorf *v.* Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164 (1899); Schwinger *v.* Hickok, 53 N. Y. 280 (1873).

But such service is insufficient unless it reasonably tends to give the defendant notice and an opportunity to be heard. Roller *v.* Holly, 176 U. S. 398 (1900); United States *v.* Fisher, 222 U. S. 204 (1911).

[16] Hence even actual service upon a nonresident defendant outside the jurisdiction is insufficient. Harkness *v.* Hyde, 98 U. S. 476 (1878); Wilson *v.* Seligman, 144 U. S. 41 (1892); Denny *v.* Ashley, 12 Colo. 165, 20 Pac. 331 (1888); Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6 (1891); McEwan *v.* Zimmer, 38 Mich. 765 (1878); Scott *v.* Streepy, 73 Texas, 547, 11 S. W. 532 (1889). Similarly, service by publication upon a nonresident is insufficient. Freeman *v.* Alderson, 119 U. S. 185 (1886); Baker *v.* Baker, Eccles & Co., 242 U. S. 394 (1917); Cocke *v.* Brewer, 68 Miss. 775, 9 So. 823 (1891); Smith *v.* McCutchen, 38 Mo. 415 (1866); McKinney *v.* Collins, 88 N. Y. 216 (1882). Compare D'Arcy *v.* Ketchum, 11 How. (U. S.) 165 (1850) (service upon a co-debtor).

brought, the jurisdiction over the defendant continues throughout all stages of the action, although the defendant may in the meantime have left the state, acquired a domicile or citizenship elsewhere, or attempted to withdraw his consent.[17]

The most usual method of acquiring jurisdiction is by personal service of process upon the defendant. Such service is valid only when the defendant, whether a resident or nonresident, is within the state when served. While he is within the state, no matter for how brief a time, the state has control over him, and if during that time he is duly served with process, the court acquires jurisdiction over him,[18] unless indeed for some reason he was exempt or privileged from service.[19]

Again, jurisdiction over the person of the defendant may be acquired by his consent. This consent may be given either before or after action has been brought. Jurisdiction is conferred when the defendant enters a general appearance in an action, that is, an appearance for some purpose other than that of raising the objection of lack of jurisdiction over him.[20] A stipulation waiving service has the same effect.[21] The defendant may, before suit is

[17] Nations *v.* Johnson, 24 How. (U. S.) 195 (1860); Michigan Trust Co. *v.* Ferry, 228 U. S. 346 (1913); Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100 (1891). "This is one of the decencies of civilization that no one would dispute." Michigan Trust Co. *v.* Ferry, *supra*, per Holmes, J. As to the extent of this principle, see New York Life Ins. Co. *v.* Dunlevy, 241 U. S. 518 (1916).

[18] Smith *v.* Gibson, 83 Ala. 284, 3 So. 321 (1887); Lee *v.* Baird, 139 Ala. 526, 36 So. 720 (1903); Darrah *v.* Watson, 36 Iowa, 116 (1872); Alley *v.* Caspari, 80 Me. 234, 14 Atl. 12 (1888); Peabody *v.* Hamilton, 106 Mass. 217 (1870); Thompson *v.* Cowell, 148 Mass. 552, 20 N. E. 170 (1889).

[19] As in the case of persons inveigled into the state, and nonresident witnesses and, in some jurisdictions, nonresident parties to judicial proceedings. Stewart *v.* Ramsay, 242 U. S. 128 (1916); Matthews *v.* Tufts, 87 N. Y. 568 (1882). As to privilege from service of process, see, further, cases cited in SCOTT, CAS. CIV. PROC. 23.

[20] Boyle *v.* Sacker, 39 Ch. D. 249 (C. A. 1888); Henderson *v.* Carbondale, etc. Co., 140 U. S. 25 (1891); Western Loan Co. *v.* Butte, etc. Co., 210 U. S. 368 (1908); St. Louis Car Co. *v.* Stillwater, etc. Co., 53 Minn. 129, 54 N. W. 1064 (1893). An application for an extension of time to answer is not necessarily a general appearance. Meisukas *v.* Greenough, etc. Co., 244 U. S. 54 (1917); Lowrie *v.* Castle, 198 Mass. 82, 83 N. E. 1118 (1908). A petition for removal to a federal court is not a general appearance. Goldey *v.* Morning News, 156 U. S. 518 (1895); Wabash Western Ry. *v.* Brow, 164 U. S. 271 (1896); Mechanical Appliance Co. *v.* Castleman, 215 U. S. 437 (1910). A state statute providing that an appearance for any purpose confers jurisdiction over the defendant is constitutional. York *v.* Texas, 137 U. S. 15 (1890). *Cf.* Harris *v.* Taylor, [1915] 2 K. B. 580.

[21] Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285 (1895); Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838 (1897).

brought, give a power of attorney to confess judgment,[22] or appoint an agent to accept service, or agree that service by any other method shall be sufficient.[23] The defendant in all these cases has submitted to the control of the state and of the court over him.

Again, a state has control over its citizens and over all persons domiciled within the state even when they have gone outside the state. At common law jurisdiction over such persons can be acquired by the courts of the state only by personal service within the state, or by consent.[24] But statutes in several states have provided for other methods of service upon citizens and residents. If the methods provided for are such as are reasonably calculated to give notice and an opportunity to defend, they are constitutional.[25]

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[22] Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267 (1899); First National Bank *v.* Garland, 109 Mich. 515, 67 N. W. 559 (1896); Hazel *v.* Jacobs, 78 N. J. L. 459, 75 Atl. 903 (1910); Teel *v.* Yost, 128 N. Y. 387, 28 N. E. 353 (1891). The judgment is not valid unless the authority given in the power of attorney is strictly followed. Grover, etc. Co. *v.* Radcliffe, 137 U. S. 287 (1890); National Exchange Bank *v.* Wiley, 195 U. S. 257 (1904); *Re* Raymor's Estate, 165 Mich. 259, 130 N. W. 594 (1911).

[23] Montgomery, Jones & Co. *v.* Liebenthal & Co., [1898] 1 Q. B. 487 (C. A.).

[24] At common law if no service could be made upon a resident it was possible to outlaw him. 3 BL. COMM. 283. One result of the outlawry was to forfeit to the Crown the property of the defendant. This did not directly inure to the benefit of the plaintiff but it was a powerful club to force the defendant to appear. The process of outlawry was rejected in the United States as inapplicable to our conditions. Blessing *v.* McLinden, 81 N. J. L. 379, 79 Atl. 347 (1911); Nathanson *v.* Spitz, 19 R. I. 70, 31 Atl. 690 (1895); McCall *v.* Price, 1 McCord (S. C.) 82 (1821).

In European countries jurisdiction is normally based upon allegiance or domicile rather than upon the personal presence of the defendant. Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 193.

[25] Ouseley *v.* Lehigh Valley, etc. Co., 84 Fed. 602 (C. C., E. D. Pa., 1897); Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740 (1895) (publication and mailing); Sturgis *v.* Fay, 16 Ind. 429 (1861) (usual or last place of residence); Bryant *v.* Shute's Executor, 147 Ky. 268, 144 S. W. 28 (1912) (last and usual place of abode); Harryman *v.* Roberts, 52 Md. 64 (1879) (service at residence); Henderson *v.* Staniford, 105 Mass. 504 (1870) (publication); Continental National Bank *v.* Thurber, 74 Hun (N. Y.) 632, 26 N. Y. Supp. 956 (1893) (service at residence). *Cf.* Douglas *v.* Forrest, 4 Bing. 686 (1828) (proclamation in public place); Schibsby *v.* Westenholz, L. R. 6 Q. B. 155 (1870). But see, *contra*, Raher *v.* Raher, 150 Iowa, 511, 129 N. W. 494 (1911) (service outside the state).

A method of service is insufficient when, although it may have a tendency to give notice to the defendant, yet there is another way obviously better calculated to give notice. Service by publication is insufficient therefore when personal service is possible (Bardwell *v.* Collins, 44 Minn. 97, 46 N. W. 315 (1890)), or where the defendant had left the state but his family remained at his last place of abode. McDonald *v.* Mabee, 243 U. S. 90 (1917). It is doubtful whether service by publication upon a resident is sufficient even when no other method of service is available. See McDonald

To what extent has a state control over nonresidents not personally within the state but doing business therein, either as individuals or as partners? To what extent may the state confer upon its courts jurisdiction over such persons? In *Pennoyer* v. *Neff*,[26] in which the general principles in regard to jurisdiction were thoroughly discussed and expounded, these questions were expressly left open. Mr. Justice Field said:[27]

"Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State."

A number of cases have lately arisen involving the validity of a Kentucky statute. This statute[28] provides that:

"In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

The courts of Kentucky have upheld the validity of this statute.[29] In several cases, however, the courts of other states have held invalid Kentucky judgments rendered under the statute.[30]

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v. Mabee, *supra;* De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 354 (1896).

[26] 95 U. S. 714 (1877).

[27] *Ibid.*, 735.

[28] KENTUCKY CIVIL CODE, § 51, subsec. 6.

[29] Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419 (1903); Johnson *v.* Westerfield, 143 Ky. 10, 135 S. W. 425 (1911); Crane *v.* Hall, 165 Ky. 827, 178 S. W. 1096 (1915).

[30] Moredock *v.* Kirby, 118 Fed. 180 (C. C., W. D. Ky., 1902); Flexner *v.* Farson, 268 Ill. 435, 109 N. E. 327 (1915); Cabanne *v.* Graf, 87 Minn. 510, 92 N. W. 461 (1902). For cases holding similar statutes invalid, see Brooks *v.* Dun, 51 Fed. 138 (C. C., W. D. Tenn., 1892); Ralya Market Co. *v.* Armour & Co., 102 Fed. 530 (C. C.,

In the most recent of these cases, *Flexner* v. *Farson*,[31] an action of debt was brought in Illinois upon a Kentucky judgment. It appeared that the cause of action on which the judgment was based arose in Kentucky; that the defendants were nonresidents but were, at the time the cause of action arose, doing business in Kentucky as partners through one Washington Flexner as their agent; that service was made upon him after he had ceased to act as such agent; that the defendants did not appear in the action; and that the Kentucky court thereupon rendered judgment against them by default. The Illinois court gave judgment for the defendants, which was affirmed on appeal by the Supreme Court of the state. The plaintiff, contending that full faith and credit was denied to the Kentucky judgment, brought the case on writ of error to the Supreme Court of the United States, and that court has affirmed the Illinois judgment.[32] The opinion of the court, delivered by Mr. Justice Holmes, is very brief. After stating the facts, he says:

"It is argued that the pleas tacitly admit that Washington Flexner was agent of the firm at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. *Mutual Reserve Fund Life Association* v. *Phelps*, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96. The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Ken-

N. D. Iowa, 1900); Caldwell *v.* Armour, 1 Pen. (Del.) 545 (1899); Aikmann *v.* Sanderson, 122 La. 265, 47 So. 600 (1908). But see, *contra*, Alaska Commercial Co. *v.* Debney, 144 Fed. 1 (C. C. A., 9th Circ., 1906); Rauber *v.* Whitney, 125 Ind. 216, 25 N. E. 186 (1890); Behn *v.* Whitney, 125 Ind. 599, 25 N. E. 187 (1890); Edwards *v.* Van Cleave, 47 Ind. App. 347, 94 N. E. 596 (1911); Green *v.* Synder, 114 Tenn. 100, 84 S. W. 808 (1904).

[31] 268 Ill. 435, 109 N. E. 327 (1915).

[32] Flexner *v.* Farson, 248 U. S. 289 (1919).

tucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. *New York Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518, 522, 523. *Judgment affirmed.*"

The line of thought which the opinion seems to suggest is this: A state may exclude a foreign corporation altogether, and may therefore admit it on such conditions as it may choose to impose; but a state may not exclude nonresident persons, and may not therefore impose any conditions on admission. The problem, however, is not quite as simple as this. A state may not always exclude foreign corporations; for example, it may not exclude a corporation which seeks to do only an interstate business. But even though it may not exclude, it may impose some conditions on admission.[33]

The opinion of Mr. Justice Holmes suggests an inquiry into the basis of jurisdiction over corporations. There is no difficulty as to domestic corporations. Obviously the state which creates a corporation has the necessary control over it to serve as a basis of jurisdiction. It is domiciled within the state. At common law service upon a corporation is effected by service upon its principal officer.[34] By statute service upon other officers or agents is frequently allowed, and such service, or service by any other method, is valid if it fairly tends to give the corporation notice of the action and an opportunity to be heard.[35]

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[33] See International Harvester Co. *v.* Kentucky, 234 U. S. 579 (1914), stated and discussed *infra*, p. 885.

And even though a state may exclude, there are some conditions on admission it may not impose, *e. g.*, conditions designed to prevent resorting to the federal courts or conditions which would result in taking the property of the corporation without due process of law. See note 44, *infra*. But see the dissenting opinion of Mr. Justice Holmes in Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, 52 (1910). For a discussion of "unconstitutional conditions," see HENDERSON, FOREIGN CORPORATIONS, Chap. VIII; Report of the Commissioner of Corporations on State Laws concerning Foreign Corporations, 1915, Pt. II.

[34] Kansas City, etc. R. R. Co. *v.* Daughtry, 138 U. S. 298, 305 (1891); State *v.* Western N. C. R. R. Co., 89 N. C. 584 (1883); 1 TIDD'S PRACTICE, 8 ed., 119.

[35] St. Mary's Petroleum Co. *v.* West Virginia, 203 U. S. 183 (1906) (service upon state auditor); Clearwater Mercantile Co. *v.* Roberts, 51 Fla. 176, 40 So. 436 (1906) (publication); Nelson *v.* C., B. & Q. R. R. Co., 225 Ill. 197, 80 N. E. 109 (1907) (publication and mail); Hinckley *v.* Kettle River R. R. Co., 70 Minn. 105, 72 N. W. 835 (1897) (deposit of summons in office of secretary of state, who is charged with duty of mailing a copy to an officer of the corporation); Straub *v.* Lyman, etc. Co., 30 S. D. 310, 138 N. W. 957 (1912) (service outside the state.)

If the method of service is not reasonably calculated to give the corporation notice

A more difficult question arises as to foreign corporations, that is, corporations organized and existing under the laws of another state or territory or country than that in which the action is brought. If a foreign corporation is not doing business within the state, it is not subject to the jurisdiction of the state merely because one or more of its officers or agents happens to live there or to go there.[36] The New York and North Carolina courts long obstinately clung to the opposite view;[37] but the Supreme Court of the United States has now definitely held that a state has no jurisdiction over the corporation in such a case, and that an attempt to exercise jurisdiction is a violation of the Fourteenth Amendment.[38]

Certainly, however, a foreign corporation may voluntarily consent to submit itself to the jurisdiction of the state and of the courts of the state. And inasmuch as a corporation, although a "person"[39] and entitled as such to protection under the due-process clause of the Fourteenth Amendment, is not a "citizen"[40] and is not as such entitled to "all privileges and immunities of citizens in the several States,"[41] or "the privileges or immunities of citizens of the United States,"[42] a state may in general exclude a foreign corporation from doing business within the state.[43] It may impose conditions precedent to its doing business within the

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and an opportunity to defend, it is unconstitutional. Pinney *v.* Providence Loan & Investment Co., 106 Wis. 396, 82 N. W. 308 (1900) (leaving copy in registry of deeds, no one being charged with duty to notify defendant).

[36] St. Clair *v.* Cox, 106 U. S. 350 (1882); Goldey *v.* Morning News, 156 U. S. 518 (1895); Kendall *v.* American Automatic Loom Co., 198 U. S. 477 (1905); Newell *v.* Great W. Ry. Co., 19 Mich. 336 (1869); Moulin *v.* Insurance Co., 24 N. J. L. (4 Zab.) 222 (1853); Aldrich *v.* Anchor Coal Co., 24 Ore. 32, 32 Pac. 756 (1893).

[37] Sadler *v.* Boston, etc. Co., 202 N. Y. 547, 95 N. E. 1139 (1911), 140 N. Y. App. Div. 367, 125 N. Y. Supp. 405 (1910); Menefee *v.* Riverside, etc. Mills, 161 N. C. 164, 76 S. E. 741 (1913).

[38] Riverside, etc. Mills *v.* Menefee, 237 U. S. 189 (1915). See also Dollar Co. *v.* Canadian, etc. Co., 220 N. Y. 270, 115 N. E. 711 (1917).

[39] Santa Clara Co. *v.* Southern Pac. R. R. Co., 118 U. S. 394, 396 (1886); Smyth *v.* Ames, 169 U. S. 466 (1898).

[40] Paul *v.* Virginia, 8 Wall. (U. S.) 168 (1868).

[41] Article IV, § 2.

[42] Amendment XIV.

[43] Paul *v.* Virginia, 8 Wall. (U. S.) 168 (1868). For an exhaustive digest of decisions as to what constitutes "doing business" within a state, see the Report of the Commissioner of Corporations on State Laws concerning Foreign Corporations, 1915, 156–68.

state. It may impose as a condition precedent the filing of a consent to service of process in a designated manner. If a foreign corporation actually files such a consent it is bound thereby.[44]

Not infrequently it happens that a foreign corporation does business in a state without having filed consent to any form of service of process. The statute may not require the filing of any consent, but may simply provide that if a corporation does business within the state, service may be made upon one of its officers or agents within the state, or upon a public officer of the state. Or the statute may require the filing of a consent, but the corporation may have neglected to comply with the statute.[45] In such cases, where the corporation has not expressly assented to the jurisdiction of the state and of the courts of the state, three possible foundations for jurisdiction have been suggested: (1) that the corporation has given an "implied" consent to the jurisdiction; (2) that the corporation is present and is found within the state; and (3) that on principles of justice, if a corporation voluntarily does business within the state, it is bound by the reasonable regulations by the state of that business.[46]

1. In the leading case of *Lafayette Insurance Co.* v. *French*,[47] jurisdiction is rested upon the theory of "implied" consent. Mr. Justice Curtis said:[48]

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 Pet.

[44] The decisions on this point are numberless. See BEALE, FOREIGN CORPORATIONS, Chaps. VII, XI; HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, Chap. V.

But a foreign corporation is not bound by its consent to conditions which are so outrageously unreasonable as to amount to a deprivation of property without due process of law. "A state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law." Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 83 (1913). It is conceived therefore that if the corporation should agree to be bound by a judgment rendered without any service of process, or after service by a method which would have no tendency to give notice of the action to the corporation or an opportunity to be heard, it would not be bound. See note 33, *supra*, and note 50, *infra*.

[45] For a summary of the statutes of the several states, see the Report of the Commissioner of Corporations on State Laws concerning Foreign Corporations, 1915, 34–41.

[46] A corporation, it seems clear, is domiciled only in the state creating it. Hence jurisdiction over a foreign corporation cannot be based upon domicile.

[47] 18 How. (U. S.) 404 (1855).

[48] Pages 407, 408.

519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence . . . Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts."

This line of reasoning is undoubtedly sound enough in cases in which it is really possible to find sufficient evidence of consent. In truth, however, although it is sometimes possible to spell out a consent by the corporation, it is often difficult and sometimes impossible to do so.[49] But the corporation may be held even if it appears that it did not consent. The Supreme Court recognizes that the implication of consent in many cases involves a fiction, but the corporation nevertheless does not on that account escape.[50]

2. To meet the difficulty of lack of any real consent, and to avoid the necessity of resorting to a fiction, it has been urged that the jurisdiction is based upon the presence of the corporation within the state.[51] It is asserted that a corporation is actually present and can be found wherever it is engaged in business. On this theory a foreign corporation can be served in a state where it does

[49] The difficulties with the theory of implied consent are set forth in HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, Chap. V; Cahill, "Jurisdiction over Foreign Corporations," 30 HARV. L. REV. 676. The theory is supported in BEALE, FOREIGN CORPORATIONS, Chap. XI.

[50] Conversely, a foreign corporation is not bound by regulations which are so outrageous as to amount to a deprivation of property without due process of law. It has been held that if a state statute provides for service of process upon a foreign corporation doing business within the state by service upon a public officer, such service is invalid if it is not such as is calculated to give notice to the corporation. King Tonopah Mining Co. *v.* Lynch, 232 Fed. 485 (D. C., Nev., 1916) (service upon state official not charged with duty to notify corporation); Knapp *v.* Bullock Tractor Co., 242 Fed. 543 (D. C., S. D. Cal., 1917) (like preceding case). *Cf.* Mutual Life Ins. Co. *v.* Spratley, 172 U. S. 602 (1899); Commercial Mutual Accident Co. *v.* Davis, 213 U. S. 245 (1909).

[51] For a discussion of this theory, see HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, Chap. V; 30 HARV. L. REV. 676–96.

business even though no statute authorizes such service. Some cases have indeed gone to this length.[52] There would seem to be no objection on principle to this theory, but it has never met with complete and unqualified approval by the Supreme Court. In a famous dictum of Chief Justice Taney in *Bank of Augusta* v. *Earle*,[53] the proposition was asserted in broad terms that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." Although since that dictum was promulgated, the broad doctrine there laid down has been considerably limited, and the Supreme Court has in many cases stated that a corporation may be found outside the state wherein it was organized, yet the Supreme Court has never completely and definitely repudiated the dictum. Two recent cases, *Old Wayne Life Association* v. *McDonough*[54] and *Simon* v. *Southern Railway*,[55] decided by that court, tend to show a disapproval of, or at least a limitation on, the doctrine of corporate presence. In these cases it was held that under a statute providing for service on foreign corporations doing business within the state by service upon a public official, such service was insufficient if the cause of action arose in another state.

3. In explanation of *Old Wayne Life Association* v. *McDonough* and *Simon* v. *Southern Railway*, Learned Hand, J., has, in the case of *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*,[56] suggested a third possible theory on which to base jurisdiction over foreign corporations. In that case it appeared that a New York statute required every foreign corporation doing business in New York to take out a license, which should not be issued unless the corporation had appointed an agent within the state upon whom process might be served. The defendant corporation did appoint such an agent, and in an action brought in the federal District Court for the Southern District of New York, and based upon a cause of action which did not arise in New York, service was made upon the

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[52] La Compagnie Générale Transatlantique *v.* Law & Co., [1899] A. C. 431; Wilson Packing Co. *v.* Hunter, 8 Biss. 429, Fed. Cas. No. 17,852 (1879). But see Desper *v.* Continental Water Meter Co., 137 Mass. 252 (1884). And see cases cited, SCOTT, CAS. CIV. PROC. 38, note.

[53] 13 Pet. (U. S.) 519, 588 (1839).

[54] 204 U. S. 8 (1907).

[55] 236 U. S. 115 (1915).

[56] 222 Fed. 148 (D. C., S. D., N. Y., 1915).

agent. A motion to set aside the service was denied.[57] Judge Hand said:

"When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

"The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon* v. *Southern Railway*, *supra*, and *Old Wayne Insurance Co.* v. *McDonough*, *supra*. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given." [58]

Here then is a third theory of the basis of jurisdiction over foreign corporations. If a foreign corporation voluntarily does business within the state it is bound by reasonable regulations of that business imposed by the state, not because it is found there, not because it has consented to those regulations, but because it is as reasonable and just to subject the corporation to those regulations as though it had consented. The jurisdiction is based upon the control of the state resulting from the voluntary act of the corpora-

[57] Bagdon *v.* Philadelphia, etc. Co., 217 N. Y. 432, 111 N. E. 1075 (1916), *accord.*

[58] 222 Fed. 148, 151. This opinion was approved by Holmes, J., in Pennsylvania Fire Ins. Co. *v.* Gold Issue Min. & Mill. Co., 243 U. S. 93 (1917), in which case the defendant had filed a consent to service of process upon a *public official*, and the service was upheld although the cause of action arose outside the state. It is not yet settled whether, in view of the Old Wayne and Simon cases, service of process upon an *agent* is valid, when the cause of action arose outside the state, if no consent had been filed. The service was held invalid in Fry *v.* Denver, etc. R. R. Co., 226 Fed. 893 (D. C., N. D., Cal., 1915), and in Takacs *v.* Philadelphia, etc. Ry. Co., 228 Fed. 728 (D. C., S. D., N. Y., 1915). But the contrary result was reached in Barrow Steamship Co. *v.* Kane, 170 U. S. 100 (1898); Atchison, etc. Ry. Co. *v.* Weeks, 248 Fed. 970, 979 (D. C., W. D., Texas, 1918); Reynolds *v.* Missouri, etc. Ry., 228 Mass. 584, 117 N. E. 913 (1917); Tauza *v.* Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 (1917).

tion in doing business within the state, not from its voluntary consent to be bound by the laws of the state.[59] Here is no illegitimate assumption of power by the state; Tobago is not trying to bind the rights of the whole world.

Having examined the possible bases of jurisdiction over foreign corporations, we may turn again to the question of jurisdiction over nonresident persons.[60] When citizens of other states seek to do business within the state, either as individuals or as partners, the state has no power arbitrarily to exclude them. To do so would violate the provision of Article IV, section 2, of the federal Constitution that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"; and the provision of the Fourteenth Amendment that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But because the state cannot exclude, it does not follow that it may not impose conditions upon admission.

It is well settled that a state may, in the reasonable exercise of the police power, regulate business carried on within the state, although the business is of an interstate character and although it is carried on by nonresidents. Under the pretence of exercising the police power, to be sure, the state may not impose burdens upon interstate commerce, or take property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, or deny to citizens of the several states and citizens of the United States the privileges and immunities guaran-

[59] A state may validly provide for service of process upon a foreign corporation which has ceased to do business within the state if the cause of action arose in the state before the withdrawal. Mutual Reserve Life, etc. Ass'n *v.* Phelps, 190 U. S. 147 (1903); McCord Lumber Co. *v.* Doyle, 97 Fed. 22 (C. C. A., 8th Circ., 1899); Tucker *v.* Insurance Co., 232 Mass. 224, 122 N. E. 285 (1919). *Cf.* Hunter *v.* Mutual Reserve Life Ins. Co., 218 U. S. 573 (1910). It would be impossible to say that at the time of service the corporation is present within the state. People's Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79 (1918). These decisions can be upheld only on the theory of implied consent, or on the theory suggested by Judge Hand.

[60] I have not attempted to distinguish cases where the business is carried on by a partnership from those in which it is carried on by an individual. In our law a partnership is not treated as an entity. If it were so treated it would be possible to apply many of the principles applicable to corporations which are not applicable to individuals. See Worcester, etc. Co. *v.* Firbank, Pauling & Co., [1894] 1 Q. B. 784; Von Hellfeld *v.* Rechnitzer and Mayer Frères & Co., [1914] 1 Ch. 748; Sugg *v.* Thornton, 132 U. S. 524 (1889); State *v.* Adams Express Co., 66 Minn. 271, 68 N. W. 1085 (1896).

teed by the Constitution. When a state attempts to compel nonresidents doing business within the state to submit to the jurisdiction of the courts of the state, the validity of the attempt depends upon the question whether this is a reasonable exercise of the power to regulate business.

The state has not power to exclude a corporation which seeks to do within the state only interstate business. Nevertheless it was held in *International Harvester Co.* v. *Kentucky*[61] that the state may validly provide that such a corporation should appoint an agent to accept service of process. Such a provision does not impose an improper burden upon interstate commerce. It merely treats foreign corporations like domestic corporations. Mr. Justice Day, speaking for the court in that case, said:

"It is argued that a corporation engaged in purely interstate commerce within a State cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement cannot be made, the ordinary agents of the corporation, although doing interstate business within the State, cannot by its laws be made amenable to judicial process within the State. The contention comes to this, so long as a foreign corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention. True, it has been held time and again that a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character." [62]

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[61] 234 U. S. 579 (1914).

[62] A statute subjecting cars used in interstate commerce to attachment and garnishment is not an improper interference with interstate commerce. Davis *v.* Cleveland, etc. Ry. Co., 217 U. S. 157 (1910).

A state may not impose unreasonable conditions upon a corporation seeking to carry on only interstate commerce within the state. International Textbook Co. *v.* Pigg, 217 U. S. 91 (1910); Sioux Remedy Co. *v.* Cope, 235 U. S. 197 (1914). But it may impose such conditions upon a corporation seeking to carry on intrastate as well as interstate commerce, provided the conditions do not actually burden interstate commerce. Interstate Amusement Co. *v.* Albert, 239 U. S. 560 (1916). It may not, however, impose conditions upon a corporation seeking to carry on intrastate as well as interstate commerce if the conditions would operate as a burden upon inter-

Although the state may not exclude the corporation, it may compel the corporation to submit to the jurisdiction of its courts.

The case of *Kane* v. *New Jersey* [63] shows that although a state may not exclude from its borders a nonresident individual, yet it may under certain circumstances impose as a condition of admission the appointment of an agent to accept service of process. A statute of New Jersey provided that a nonresident owner of an automobile should, as a condition precedent to his right to operate his car in the highways of the state, appoint the secretary of state as his agent upon whom process might be served "in any action or legal proceeding caused by the operation of his registered motor vehicle within this state against such owner." The defendant, a resident of New York, having failed to comply with this provision was arrested while driving his automobile in New Jersey. When arrested he was on his way from New York to Pennsylvania. He claimed that the statute as to him violated the Constitution and laws of the United States regulating interstate commerce, and also the Fourteenth Amendment. These contentions were overruled, and he was fined. The conviction was affirmed in the highest court of the state, and the case was brought to the Supreme Court of the United States by writ of error. It was held that the statute was constitutional. Mr. Justice Brandeis, speaking for the court, said:[64]

"We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners."

A state may then in the exercise of its police power impose reasonable conditions upon nonresidents wishing to do acts within

state commerce. Western Union Tel. Co. *v.* Kansas, 216 U. S. 1 (1910); Pullman Co. *v.* Kansas, 216 U. S. 56 (1910); Ludwig *v.* Western Union Tel. Co., 216 U. S. 146 (1910); Looney *v.* Crane Co., 245 U. S. 178 (1917); International Paper Co. *v.* Massachusetts, 246 U. S. 135. *Cf.* Interstate Amusement Co. *v.* Albert, 239 U. S. 560 (1916).

[63] 242 U. S. 160 (1916).

[64] *Ibid.*, 167.

the state. The mere fact that the state may not prevent the doing of such acts does not preclude it from imposing such conditions. The police power is not confined to regulations of public health, morals, safety, and the like. It affects economic as well as social conditions. "It embraces regulations designed to promote public convenience or the general prosperity or welfare." [65] The conditions, to be sure, must be such as fairly fall within the proper scope of the police power, and such as do not violate any rights guaranteed by the federal Constitution, such as those protected by the interstate-commerce clause or by the "privileges and immunities" clauses or the due-process clause, or the clause forbidding a state to deny to any person within its jurisdiction the equal protection of the laws. Undoubtedly a statute forbidding a foreign corporation to enter the state to carry on interstate commerce, without filing a consent to the jurisdiction of the courts of the state as to all causes of action, no matter where or how arising, is unconstitutional.[66] Similarly, doubtless, a statute forbidding a nonresident to operate his automobile within the state, unless he has consented to submit himself to the jurisdiction of the courts of the state as to all causes of action, whether or not arising out of the operation of the automobile in the state, would be unconstitutional. Similarly, doubtless, a statute providing that nonresidents should not do business within the state without having consented to the jurisdiction of the courts of the state as to all causes of action, no matter where or how arising, would be unconstitutional.

[65] Sligh *v.* Kirkwood, 237 U. S. 52, 59 (1915). See, also, Central Loan & Trust Co. *v.* Campbell, 173 U. S. 84 (1899); C. B. & Q. Railway *v.* Drainage Comm'rs, 200 U. S. 561, 592 (1906); Bacon *v.* Walker, 204 U. S. 311 (1907); Noble State Bank *v.* Haskell, 219 U. S. 104 (1911); Eubank *v.* Richmond, 226 U. S. 137 (1912). See FREUND, POLICE POWER, §§ 8, 12.

[66] Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 205 (1914). In that case the court said: "The second [condition], respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the State has said, it requires the corporation to subject itself to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there. If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause."

But there would seem to be no objection to a statute which forbids nonresidents to do business within the state without having consented to the jurisdiction of the courts of the state as to all causes of action arising within the state and out of the business carried on within the state. Such a provision seems essentially just. Very clearly provisions allowing creditors to attach the assets employed in the business within the state are desirable and proper, and such provisions are well-nigh universal; but very frequently the business is carried on without the use of any property within the state. In such a case should a creditor of the business be bound to resort to other states to search out and discover the owner of the business? That would seem to be a hardship to the creditor. The words of Mr. Justice Swayne, speaking of the unfairness of refusing a creditor the right to sue a foreign corporation in the state where the corporation was carrying on business and where the cause of action arose, are equally applicable here. "In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility." [67] On the other hand there is little hardship on the owner of the business if he is required to answer for all claims arising out of the business in the place where the business is carried on. A statute requiring persons carrying on business within the state to consent to service of process upon an agent in actions arising within the state out of the business carried on within the state, would therefore seem to fall within the proper scope of the police power.

If a state has power to forbid a nonresident to do business without having filed a consent to service of process upon his agent, the question arises whether the state has jurisdiction in the absence of such express consent. We have seen that in the case of corporations, on one or the other of three possible theories, the Supreme Court has held that the state may acquire jurisdiction over foreign corporations doing business within the state, as to causes of action therein arising, although no consent was expressly given. How far are these three theories applicable to the case of nonresident individuals? It seems impossible to say that the nonresident is present and "found" within the state; an individual cannot be present

[67] Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65, 84 (1870).

except where his physical body is. But it would seem that it is as easy to apply the doctrine of "implied" consent to an individual nonresident, as to a foreign corporation. If the mere fact that a corporation does business in a state constitutes a consent to the conditions which the state may properly and does impose, it is hard to see why the doing of business by an individual is not a consent to the conditions which the state may properly and does impose. The mere fact that the state may not properly impose conditions upon individuals which it may impose upon corporations is immaterial, as long as the conditions it does impose are proper. Furthermore if, according to Judge Hand's theory, a corporation is bound by conditions imposed by the state, not because it has consented to be bound, but because by voluntarily doing business within the state it is just and proper to hold that it is bound by the reasonable regulations of that business by the state, there is no good reason why an individual should not likewise be bound.

There are several grounds, however, on which it may be urged that it is possible to reconcile the decision in *Flexner* v. *Farson* with the principles discussed above.

The Kentucky statutes do not make provision for any form of substituted or constructive service upon residents in a proceeding *in personam*. In Kentucky the only form of service upon residents in such a proceeding is personal service. Does the provision for service upon the agent of a nonresident doing business within the state discriminate against nonresidents in such a way as to violate the constitutional provisions as to privileges and immunities? It would seem not. It is not necessary to put residents and nonresidents on an exact equality. Nonresidents have by virtue of their nonresidence a certain advantage over residents. It is more difficult to find them within the jurisdiction and to effect personal service upon them. Since the discrimination merely removes this advantage, it is not a violation of the constitutional provisions.[68] The case of *Ballard* v. *Hunter*[69] is instructive on this point. In that case a proceeding *in rem* was brought in Arkansas for the sale of land in that state for nonpayment of taxes. Service was made

[68] Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 591, 76 S. W. 419 (1903). The opposite view was taken in Moredock *v.* Kirby, 118 Fed. 180 (C. C., W. D., Ky., 1902), and in Caldwell *v.* Armour, 1 Pen. (Del.) 545 (1899).

[69] 204 U. S. 241 (1907).

by publication upon the defendant, a nonresident owner. This service was in accordance with the statutes of Arkansas, which required personal service upon resident owners at least twenty days before the rendition of the decree of sale, but which provided for constructive service by publication of four weeks upon nonresident owners. It was contended that the statute discriminated against nonresident owners, in violation of the provisions of the federal Constitution. As to this Mr. Justice McKenna said: [70] "We have no doubt of the power of the State to so discriminate, nor do we think extended discussion is necessary. Personal service upon non-residents is not always within the State's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource." [71]

Again, the Kentucky statute makes no distinction between causes of action arising within the state and causes of action arising elsewhere. To the extent to which the Kentucky statute attempts to allow an action for a cause of action not arising within the state, by service of process upon an agent, it is undoubtedly unreasonable and unconstitutional. But it would seem that there is no objection to holding that the statute is severable and that it is valid as to causes of action arising within the state, out of the business carried on within the state. The statutes relating to corporations frequently make no distinction between causes of action arising within the state and those arising elsewhere, and although under *Old Wayne Life Association* v. *McDonough* and *Simon* v. *Southern Railway*, these statutes have been held invalid as to causes of action arising outside the state, they are upheld as to causes of action arising within the state.

There is, however, a ground upon which *Flexner* v. *Farson* may

[70] 204 U. S. 254.

[71] See Kane *v.* New Jersey, stated *supra*, p. 886.

Similarly it is not uncommon to allow attachment of the property of nonresidents only. This is not an unconstitutional discrimination. Campbell *v.* Morris, 3 H. & McH. (Md.) 535 (1797). It is not unconstitutional to allow the attachment of property of a nonresident without requiring the plaintiff to give a bond, although such a bond is required in the case of attachment of property of a resident. Central Loan & Trust Co. *v.* Campbell, 173 U. S. 84, 97 (1899); Marsh *v.* Steele, 9 Neb. 96 (1879). Compare St. Mary's Petroleum Co. *v.* West Virginia, 203 U. S. 183 (1906), in which it was held that a provision for service upon the state auditor in actions against nonresident domestic corporations and foreign corporations was not unconstitutional, although there was no similar provision as to domestic corporations.

be supported. The Kentucky statute provided for service upon an agent in charge of the business. The person served in *Flexner* v. *Farson* had ceased to be an agent at the time when process was served upon him. Service therefore was not in accordance with the terms of the statute, and hence was insufficient.[72] The decision is therefore reconcilable with the principles advocated above; and it is to be hoped that the Supreme Court of the United States will not feel that it is precluded by the decision from holding that a state may validly provide for service of process upon nonresidents doing business within the state, by service upon an agent, in actions arising in the state out of the business carried on within the state.

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[72] See People's Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79 (1918).